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IN THE

Supreme Court of the United States

OCTOBER TERM 19 69

No. 479

LEONARD SIMASKO,
Petitioner

vs.

TOWNSHIP OF HARRISON,
MACOMB COUNTY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND OBJECTIONS TO THE JURISDICTION FOR WRIT OF CERTIORARI

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WO. 2-8745—WO. 2-8732

TABLE OF CONTENTS

	Page
Opinions	2
Jurisdiction	2-3
Statement of Question Involved With Respect to the Merits of This Matter As Heard in the Michigan Courts	3
Statement of Facts	3-5
Argument	6-12
Conclusion	12-13

INDEX TO AUTHORITIES CITED

Aztec Copper Co. v. Auditor General, 128 Mich. 615	9, 10, 11
Campau v. Van Dyke, 15 Mich. 371	8
Cook v. Auditor General, 124 Mich. 430	8
Cook v. Hall, 123 Mich. 378	7
Epstean v. Mintz, 226 Mich. 660	9
Farr v. Nordman, 346 Mich. 266	8
McFarlane v. Simpson, 153 Mich. 193, headnote no. 4	9
Odgers v. Lentz, 319 Mich. 502 (Macomb County) at page 506	9
Palmer v. State Land Office Board, 304 Mich. 628	9
Pratt v. Corns, 214 Mich. 390, 395	9

Page

Supreme Court Rules:

Rule 19, ¶1(b) 2

Rule 23, ¶1(a) 2

Rule 24 1

United States Code:

Title 28, Section 1257(3) 2

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Respondent, Township of Harrison, files a brief in opposition to petitioner's, Leonard Simasko, petition for a writ of certiorari to review a final decision of the Court of Appeals for the State of Michigan and further in accordance with Rule 24 of the Supreme Court Rules objects to the jurisdiction of this Honorable Court to grant a writ of certiorari to the petitioner.

OPINIONS

In addition to the opinions filed by the petitioner, the decision of the trial judge, the Honorable James E. Spier, Circuit Court Judge of the Macomb Circuit Court, denied petitioner's claim.

Respondent further states that appendices "A", "B", and "C" appended to the writ of certiorari filed by the petitioner and the files and records of the Macomb Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court all consistently show decisions against the petitioner with the Supreme Court of the State of Michigan denying petitioner's application for leave to appeal on April 16, 1969 and petitioner's petition for rehearing of application for leave to appeal on May 9, 1969.

JURISDICTION

Respondent further objects to the jurisdiction of this Honorable Court for issuance of writ of certiorari in that petitioner, Leonard Simasko, has not shown to this Honorable Court the basis for the granting of writ of certiorari as set forth in paragraph 1(b) of Rule 19 of the Supreme Court Rules nor as stated in 28 USC Section 1257(3). Petitioner states the constitutional provision involved is the 14th amendment to the Constitution of the United States claiming a taking of property without due process of law. Respondent submits that petitioner has had a complete hearing of his case and "day in Court" as evidenced by the opinions attached in Petitioner's Appendices "A", "B", and "C". Respondent further represents to this Honorable Court that petitioner has failed to comply with the rules (Rule 23, ¶1(a)) and requirements of this Court in

his request for writ of certiorari by failing to append and file the opinion of the trial court, Macomb County Circuit Court, to his petition. As stated, said opinion by Circuit Judge James E. Spier also denied petitioner's claim.

STATEMENT OF QUESTION INVOLVED WITH RESPECT TO THE MERITS OF THIS MATTER AS HEARD IN THE MICHIGAN COURTS

May a tax deed be collaterally attacked by an action to quiet title, wherein said action was not commenced until more than seven years after the tax title purchaser obtained possession of the property?

The Trial Court and Court of Appeals answered this question, "yes", holding in favor of respondent and against petitioner and the Michigan Supreme Court denied leave to appeal.

STATEMENT OF FACTS

On or about July 17th, 1958, one Norbert P. Neff, now deceased, was served with a delinquent tax notice of redemption at Grosse Pointe, Wayne County, Michigan, concerning certain lands and premises he then owned in the Township of Harrison, County of Macomb and State of Michigan. Service of this notice was made by a Deputy Sheriff of Macomb County and not by the Sheriff of Wayne County as provided by statute. Thereafter in March or April of 1959, Neff sold his interest in said lands and premises to the petitioner herein, and in so doing, conveyed a quit claim deed to said petitioner which was duly recorded at the Registry of Deeds in the County of Macomb, State of Michigan. It should be here noted that petitioner by his own admission stated that he began negotiations with

the said Norbert P. Neff in January of 1959, and at that time, January of 1959, he was aware of the tax title owned by the respondent herein, Township of Harrison. Petitioner further, by his own admission in court, admits to being an attorney for in excess of ten years, and a licensed real estate broker for upwards of ten years.

It should be here noted that petitioner's statement of facts is in error when it recites that petitioner did not learn of the tax deed until April of 1959 after he had purchased the subject premises from Mr. Neff. It is also error that the purchase was for $4,500.00. The land contract recited the amount of $4,500.00, but what was actually paid by Mr. Simasko to Mr. Neff and to the hospital is closer to the sum of $300.00 to $400.00.

In April of 1959 petitioner tendered payment to respondent for the back taxes, and said respondent refused payment, whereupon petitioner deposited same with the Macomb County Clerk. Shortly after the respondent obtained its tax deed it occupied said lands and premises and did exercise acts of dominion and control over the same, including the demolition of a house located on said premises. Respondent further removed the lands from the tax rolls of 1959, as being Township owned property. Petitioner made no effort to occupy the land in question at any time, nor did petitioner seek to pay taxes for the said property after his original tender in 1959. The first attempt by him to obtain possession of the property was the institution of this suit to quiet title in March of 1966, some seven years almost to the day, after allegedly acquiring title from Norbert P. Neff.

Respondent admits that service of the notice of redemption was made by the Sheriff of the wrong county, upon the owner of the property, but all agree that the property

owner did receive notice of the right of redemption and failed to redeem within the statutory period.

Respondent relies on substantial compliance with the statute, for service of the notice of redemption and the further defense that laches bars the petitioner's claim. Because the case was in a court of equity, the two defenses, in effect, merge into one for the reason that substantial compliance and laches are both equitable defenses and are relied upon by the court when an injustice will be served by a strict construction of a statutory law. Such is the case in the instant action and therefore, the respondent admits the erroneous service and the few cases which hold that strict construction of the statute must be observed, but charges the real issue to be the one determined by the trial court. The trial court correctly reasoned that petitioner was guilty of laches in waiting seven years to collaterally attack the tax title owned by the respondent herein.

Petitioner then instituted an appeal to the Court of Appeals where again the Court of Appeals determined that he had notice of the tax sale and that the lengthy delay in filing his action against respondent precluded petitioner's successful assertion of rights in the property and affirmed the opinion and order of the trial court. Petitioner then instituted this appeal to the Michigan Supreme Court and in so doing alleges so-called statements of questions involved which should not properly be before it as petitioner is seeking an equitable remedy, but asks for strict construction of the statutes in such case made and provided. The Michigan Courts correctly determined that the petitioner was guilty of laches and that laches is an equitable defense and as such supersedes the questions alleged by him. Accordingly, respondent will not seek in this brief to argue petitioner's question but will concern itself with the true issue.

ARGUMENT

Briefly we have here a case where an experienced attorney and real estate broker discovered in January of 1959 that the owner of property in Harrison Township, namely Norbert P. Neff, had, on the face of it, lost title to property for non-payment of taxes. This experienced attorney and real estate broker, however, discovered that the wrong sheriff had served notice of redemption upon the property owner. Thus realizing that by a legal technicality the tax deed could be void, he negotiated the purchase of the property from Neff, never, of course, divulging the true facts to the property owner. This is borne out by testimony in the trial court. If Neff had known of the irregularity, there would have been no need for him to try to redeem the property as he would have done just as the petitioner did after he obtained his deed from Neff.

Therefore, we see the petitioner attempting to acquire title at a very nominal value, from a property owner who believed he no longer owned the property.

If the petitioner, in 1959, had instituted this action there could be little room for argument. However, he did nothing and we can only presume that he was waiting to see whether the property was worth while recovering. He sat idly by while the Township of Harrison exercised full ownership over the property and removed the property from the tax rolls. Not until seven years later did he institute this action, when the property had increased from a worth of approximately $4,000.00 to, in his own words, a value of $20,000.00. Keep in mind also, that the total amount expended by him for this property and any other tax sale properties that he acquired from Mr. Neff, amounted to approximately $350.00. In addition, the Township of Harrison spent con-

siderable money clearing the property and filling the low spots with fill dirt acquired from the Highway Department. The Township further entered into a lease to allow the L'Anse Creuse Little League to use the property for a Little League diamond, said lease being for ten years and dated 1965.

Having these facts in mind, may not a court of equity find the petitioner guilty of laches? I believe the answer to this question is "Yes," and our case law bears out the reason for such an answer. The court is directed to the case of *Cook v. Hall,* 123 Mich. 378. This case involved a petition to set aside tax sales, and the case was instituted by the original property owner. Defendant purchased the tax deed in 1897 and plaintiff instituted this action in 1899. The court held that the plaintiff was guilty of laches for waiting two years to try and redeem his taxes. Plaintiff had charged irregularities in the tax sale but the court declined to allow the plaintiff to collaterally attack the tax deeds for the reason that the plaintiff was guilty of laches. The court stated on pages 383 and 384:

> "He attacks only the proceedings leading up to and upon the sale. He knew that his lands were sold, and that some of the defendants had obtained title thereto, and yet chose to rest upon his rights for two years, without taking any steps provided by the law to test the validity of the proceedings. Some of the defendants have meanwhile become interested, not in the land itself but in the timber cut therefrom, and without any knowledge that the petitioner claimed any interest therein. Under such circumstances, equity requires that a party move with promptness to assert his rights, and to protect the interests of those who may become innocent purchasers of the products which may be served. Petitioner has utterly failed to make any showing entitling him to the favor or grace of a court of equity. His present position is one of his own choosing, for which he has no one to blame but himself."

On page 384 the court further quotes from *Campau v. Van Dyke,* 15 Mich. 371:

> "Sound public policy and a just regard for the stability of private rights require that the solemn judgments and decrees of courts, affecting the rights of property, shall not be lightly disturbed, nor, without the strongest reason, allowed to be impeached after any considerable period of time, during which the parties have been allowed to rely upon them, and others may have obtained interests on the faith of them, or the evidence by which they might have been sustained has been lost. And if a party to such judgment or decree might, after any considerable period, impeach its validity without showing a proper excuse or reasonable justification for the delay, * * * a general feeling of insecurity and distrust, very injurious to property and business, must naturally result."

Thus, we have in the *Cook* case, a case decided in 1900, a policy set down on cases involving tax sales. This case has never been reversed nor overruled and is still the law today. The plaintiff Cook, the following year, attempted to reverse the Supreme Court's action by filing an action for mandamus against the Auditor General to cancel the tax deed; and the court in this case, being *Cook v. Auditor General,* 124 Mich. 430, held that the tax deed could not be collaterally attacked.

The Michigan Supreme Court has further required that a land owner who has notice that his land has been sold for taxes and desires to have such sale set aside, must take proceedings therefore within one year. *Farr v. Nordman,* 346 Mich. 266: When a land owner sits idly by after notice of his tax sale, the Supreme Court raises then the defense of laches if prompt action isn't taken by the land owner.

> "The doctrine of laches is founded upon wrong in action to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right."

Epstean v. Mintz, 226 Mich. 660:

> "As quoted in Reed v. Welsch, 358 Mich. 579, and Angeloff v. Smith, 254 Mich. 99."

Where a land owner knows for seven years that petitioner had bought his land from the State and held a tax deed therefor and claimed title to it but made no effort to open the decree until the purchaser petitioned for a writ of assistance, there was held to be such laches as will preclude an attack upon the tax sale decree. *McFarlane v. Simpson,* 153 Mich. 193, headnote no. 4.

Quoting from *Odgers v. Lentz,* 319 Mich. 502 (Macomb County) at page 506,

> "A court held in Hayward v. O'Conner, 145 Mich. 52, and in Shaaf v. O'Conner, 146 Mich. 504:
>
> "When the owner of land has notice—no matter how he obtained that notice—that his land has been sold for taxes, he must, if he desires to have the sale set aside by the Circuit Court, take proceedings within one year."

See also *Palmer v. State Land Office Board,* 304 Mich. 628. As stated in *Pratt v. Corns,* 214 Mich. 390, 395:

> "One who has let his legal remedy be outlawed cannot obtain relief in equity. *Webster v. Gray,* 37 Mich. 37. This doctrine has been frequently announced by this court."

The court is further directed to the case of *Aztec Copper Co. v. Auditor General,* 128 Mich. 615. In this case the court quotes from the learned opinion of the trial judge,

on page 618, wherein the trial judge reviewed the policy of laches and what can be considered a reasonable time to act. On page 619 the opinion reads:

> "It has been held that a decree may be set aside by petition after one year, where the court had no jurisdiction to make it, provided the petitioner shows strong equities in his favor, and was not guilty of laches. * * * This rule is under the general equity practice, independent of the statute above quoted, and hence the questions naturally arise: What is a reasonable time? And was the petitioner guilty of laches in these cases? * * * From above and other cases it also seems clear that parties cannot be guilty of laches until notice of the sale and purchase has become known to the parties, and from that time only can laches be imputed."

It thus becomes clear that Michigan case law provides that a court of equity has the power, based upon the facts, to find laches as a legitimate defense in tax sale cases, and the period of time laches begins to run is the time of the notice of sale and purchase. In the case at bar the petitioner admitted that he had knowledge of the purchase by the respondent in January of 1959. Yet he took no action for more than seven years, during which time the Township expended considerable money for the property leased to third parties and lost revenue from taxes which would normally have been spread. Other losing parties from the taxes would, of course, be the county and the school district. Clearly, the petitioner was waiting for seven years, should be considered laches per se. The *Cook* case, *supra,* was only two years, yet the court found laches. Petitioner's counsel, in his argument, claimed that the petitioner was merely waiting for the former owners to clear title to the property. Is the court to stand by and allow an experienced attorney and real estate broker to use the excuse that he did nothing

because he was waiting for a layman to clear up title to the property? I think not.

Respondent further contends that a court of equity would not and should not allow an interloper such as the respondent, to acquire title to property because of an irregular service. Respondent maintains that the irregular service would be a rightful claim of the property owner (the actual property owner) injured if it was timely asserted, but in this case the actual owner made no effort to enforce his rights. An examination of the cases cited by petitioner bears out the fact that all of the plaintiffs were the actual owners of the property at the time of the tax deed, and were not subsequent purchasers. Clearly, the court is going to protect the property owner from wrongful tax sales, but as has been pointed out in the *Cook* case, *supra,* even the actual property owners, by not acting timely, will be deprived of their property. For the court to allow petitioner to acquire title to the property in question, would be inequity on its face with the petitioner deriving unjust enrichment.

It should be pointed out to the court that petitioner at no time, has offered, in this case, to reimburse the Township of Harrison if the court should find title in the petitioner. That reimbursement must be made, is clear. The *Aztec Copper* case, in syllabus on page 615, recites:

> "A tax sale should not be set aside for defects in the proceedings without requiring the petitioner to reimburse the purchaser."

In the case at bar, because of petitioner's long wait in bringing this action, reimbursement would be most difficult to determine. Although the property has been taken off of the tax rolls, the Supervisor of Harrison Township, to the best of his ability, determined what the assessment would have been for the years 1959 through 1967, and the total taxes

and special assessments would amount to $4,340.23. This amount of course, would have to be divided among the special assessment districts and the Township of Harrison as well as the County of Macomb and the L'Anse Creuse School district. In addition, actual out-of-pocket expenses, including interest, amounted to $1,496.98. This, of course, does not take into account the many thousands of yards of fill obtained by the Township from the other governmental agencies at no cost to the Township, petitioner, of course, if he acquired title, would receive the benefit of this fill.

CONCLUSION

Respondent respectfully prays that this Honorable Court deny petitioner's request for writ of certiorari in that he has failed to comply with the rules of practice of this Court by failing to file and append the opinion of the Macomb County Circuit Court. However, if the petition for writ of certiorari is not denied for this procedural error, Michigan case law clearly allows the defense of laches to be presented in a tax sale case, and petitioner's failure to claim title to his alleged property for a period of seven years, defeats his right to recovery. The trial court and Michigan Court of Appeals correctly held that the petitioner in this cause is guilty of laches such as to bar his right of action in equity. The cases heretofore cited likewise support this contention and respondent respectfully prays that this Honorable Court not grant the petitioner writ of certiorari in that petitioner has not stated a basis for jurisdiction for issuance of writ of certiorari by this Honorable Court and has been afforded due process under the 14th amend-

ment to the Constitution of the United States as shown by the statement of facts and arguments herein.

Respectfully submitted,

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Dated: August 18, 1969